SUPREME COURT U. S.

No. 740

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BRENDA K. MONROE, *et al.*,
Petitioners,

— vs. —

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JURISDICTION

This proceeding is premature for two reasons: (1) The cause has been remanded to the District Court for further proceedings concerning faculty and (2) the record in this cause is devoid of the present conditions which exist in the Jackson City School System from the application of the District Court decision of July 30, 1965.

This petition should be denied as it is identical in purpose and background to a similar petition filed with this Court and denied in the case of *Tina Deal, etc.* v. *The Cincinnati Board of Education*, 369 F.(2d) 55, (also from the 6th Cir.) See Appendix, *Petition for Certiorari filed* O.T. 1967 No. 131. *Cert. denied.* O.T. 1967.

COUNTER-STATEMENT OF QUESTION PRESENTED

Do the *Brown* decisions (*Brown* v. *Board of Education*, 347 U.S. 483 (2d Opinion) 349 U.S. 294) require compulsory integration so as to create a racial balance in schools?

If so, (1) is such requirement applicable to all States or (2) only to those States which had segregation statutes (the South) prior to the *Brown* decisions?

STATEMENT

This case is the culmination of efforts by the real plaintiff in these desegregation cases to have this Court interpret (a) the *Brown* decisions as requiring compulsory integration in the South and (b) something far less in other areas of the Country.

The Jackson School System began desegregation before the filing of any suit to require same, admittedly on a very limited basis and perhaps not as rapidly as some would like, but a beginning was made, against overwhelming public opinion, to bring the system into compliance with *Brown*.

In 1963 the City was directed to file a plan of desegregation which it did, including a districting plan for elementary schools, which plan, after modification as to time schedule, was approved by the District Court. (*Monroe* v. *City of Jackson*, 221 F.Supp. 968 [WD Tenn. 1963]).

Plaintiffs filed a further attack on the elementary zones approved by the Court in September 1964. At approximately the same time the School Board filed proposed Junior High School Zones to which plaintiffs filed exceptions. The two matters were consolidated for hearing by the District Court. Prior to the beginning of the hearings the school board suggested some changes to the elementary zoning map which the Court had once approved. The Court accepted these changes and at the conclusion of the hearing made certain minor additional changes covering an area no larger than two or three City blocks. The Court also liberalized the transfer provisions of the School Board and ordered certain steps in regard to faculty. This District Court decision was entered July 30, 1965, and is the decision complained of in the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed all but the faculty provisions. There is absolutely nothing in the record to reflect the effect of these changes on the student makeup of Jackson City Schools since July 30, 1965.

The City of Jackson School System has an absolutely free transfer plan under the District Court order approved by the Sixth Circuit. See also *Goss* v. *Board of Education*, 373 U.S. 683. Every negro student in the City of Jackson is able to transfer to any school in the system for which otherwise eligible and every white student has the same identical right. Capacity of the school is the only limitation on transfers into a school. Every student, white or negro, is required each year to register in the school located in the district in which he lives in accordance with the District Court order.

Petitioners refer to reports on file with U. S. Office of Education (not in the record) to reflect 1966 figures on mixing in Jackson schools. The exact figures for the year 1966 were 475 negro students attending mixed classes out of a total negro enrollment of 3205. 1967[1] reports reflect that approximately one out of every five negro children in the system attend integrated classes. (Exact figures 615 out of 3228.)

As stated above, the right to do so is extended to all. White children have the same right. State imposed segregation based on race does not exist in Jackson, Tennessee, schools. The order of the District Court as approved by the Sixth Circuit makes this abundantly clear. Plaintiffs are not complaining about the application nor the actual result attained from these orders and the record itself does not reflect such. They complain solely on the grounds that the District Court and the Sixth Circuit Court of Appeals do not order affirmative *compulsory integration* of the Jackson schools as opposed to the clear and concise language in both *Brown* cases ordering an end to compulsory segregation based on race.

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[1] Report to U. S. Office of Education 1967.

ARGUMENT

The sole point presented by this petition therefore is whether or not the *Brown* decisions require *compulsory integration* in schools and as a refinement of the question:

a. Is the requirement for compulsory integration applicable nationwide?

b. Is the requirement for compulsory integration applicable only to those states having statutory segregation prior to the *Brown* decisions (the South)?

The Sixth Circuit Court of Appeals in this case, as well as in *Deal*, answers these questions with a flat "No."

Every other Court of Appeals which has considered this question has also ruled flatly that compulsory integration is not required, including the Court of Appeals for the Fifth Circuit even though counsel is aware of the *Jefferson County* case. For the Fifth Circuit to arrive at the *Jefferson County* decision it had to overrule nearly fifty of its own prior decisions on this question including *Avery* v. *Wichita Falls Ind. School Dist.*, 241 F.2d 230; *Borders* v. *Rippy*, 247 F.2d 268; *Cohen* v. *Public Housing Adm.*, 257 F.2d 73; *Boson* v. *Rippy*, 285 F.2d 43; *Evers* v. *Jackson Municipal Separate School Dist.*, 328 F.2d 408; *Stell* v. *Savannah-Chatham County Board of Education*, 333 F.2d 55.

A careful reading of the decision in *Jefferson County* indicates however that the decision was dictated by the massive legal resistance to *Brown* in the Fifth Circuit Area and not by any real effort on the part of the Fifth Circuit to torture the plain wording of *Brown* to mean *compulsory integration*. Whatever may be the merit of judicial impatience with the citizenry, as in *Jefferson County*, no attempt at all is made to lay the decision at the door of the *Brown* cases. The Fifth Circuit has simply come up with its own version of what in its opinion the *Brown* cases should have been. No other Circuit agrees.

There has been no defiance whatever on the part of the City of Jackson and no such situation exists in this case as the Fifth Circuit seems to feel exists in *Jefferson County*.

Fourth Circuit

In *Bradley* v. *School Board of Richmond*, 345 F.2d 310, vacated and remanded on other grounds, 382 U.S. 103 (1965), a majority of the Fourth Circuit sitting en banc said:

> "It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. . . . There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous. . . . There is no hint (in *Brown*) of a suggestion of a constitutional requirement that a state must forbid voluntary associations or limit an individual's freedom of choice except to the extent that such individual's freedom of choice may be affected by the equal rights of others. A state or a school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil, in effect, assigns himself to the school he wishes to attend."
>
> "Imposed discrimination is eliminated as readily by a plan under which each pupil initially assigns himself as he pleases as by a plan under which he is involuntarily assigned on a geographic basis. . . . The other means (in addition to geographic zoning) of abolishing the dual zone system was to do away with zones completely. From the point of view of the ultimate objective of eliminating the illegal dual zoning, dezoning seems the obvious equivalent of rezoning and, adminis-

tratively, far easier of accomplishment when the School Board intends ultimate operation to be founded upon the free choice of the pupils."

In June, 1967, the Fourth Circuit considered similar problems in *Bowman* v. *County School Board of Charles City County, Virginia* (June 12, 1967—not yet reported) and in *Green* v. *County School Board of New Kent County, Virginia* (decided June 12, 1967—not yet reported) said:

> "They contend that compulsive assignment to achieve a greater intermixture of the races, notwithstanding their individual choices, is their due. We cannot accept that contention . . .
>
> "If each pupil, each year, attends the school of his choice, the constitution does not require that he be deprived of his choice unless its exercise is not free. This we have held and we adhere to our holdings."

Eighth Circuit

The Eighth Circuit dealt with the question in *Clark* v. *Board of Education of Little Rock School District*, 369 F.2d 661 (8th Circ. 1966), rehearing denied 374 F.2d 569 (8th Cir. 1967). The Court rejected the contention that the constitutionality of a plan depends upon whether it "works" in achieving numerical results, saying:

> "Thus, they (plaintiffs) argue that the 'freedom of choice' plan is not succeeding in the integration of the schools."
>
> "Though the board has a positive duty to initiate a plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races . . . The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. . . ."

"In short, the constitution does not require a school system to force a mixing of the races in schools according to some predetermined mathematical formula. Therefore, the mere presence of statistics indicating absence of total integration does not render an otherwise proper plan unconstitutional."

The Eighth Circuit concluded:

"Notwithstanding the H. E. W. Guidelines and the recent opinion of the Fifth Circuit (in *Jefferson County*), when a student is given a well publicized annual right to enter the school of his choice, coupled with periodic mandatory choices as set forth in the Board's amended plan, we can find on the face of it no unconstitutional state action. We find no state act that results in discrimination against Negroes (374 F.2d at 571) . . . ."

. . . . . .

"Therefore, if in fact all the students wishing to transfer were fully accommodated, the constitution would unquestionably be satisfied . . . (374 F.2d at 572) . . . ."

"If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to the classrooms. We find no unlawful discrimination in the giving of students a free choice of schools (369 F.2d at 666)."

"They are afforded an annual *right* to transfer schools if they so desire. The failure to exercise this right does not result in the student being assigned to a school on the basis of race. Rather, the student is assigned to the school he is presently attending, by reason of a choice originally exercised solely by the student (369 F.2d at 668) . . ."

. . . . . .

"On its face, we believe that the plan, as approved by us, is proper and constitutional, and appellants have made no showing that this non-mandatory freedom of choice plan to laterally transfer schools had infringed their constitutional rights (374 F.2d at 571)."

Tenth Circuit

Although at first glance it might appear that the Tenth Circuit is at variance with the above cases in *Board of Education of the Oklahoma City Public Schools* v. *Dowell* F.2d (10th Cir., January 23, 1967), *cert. denied*, 35 U.S. L. Week 3418 (U.S. May 29, 1967), this decision was bottomed upon an expressed finding of bad faith by the school board involved. On the other hand, the Tenth Circuit reaffirmed its decision in *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988 (1964) *cert. denied* 380 U.S. 914, in which the Court had said:

"Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of *Brown* v. *Board of Education*, *supra*, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend schools with them."

First Circuit

Springfield School Committee v. *Barksdale*, 348 F.2d 261 (1965).

Seventh Circuit

Bell v. *School, etc., City of Gary*, 324 F.2d 209 (1963) *cert. denied*, 377 U.S. 924 (1964).

There is tremendous pressure to push the 14th Amendment into areas that properly should be the subject of legislation and administrative action. This problem was confronted by Professor Paul A. Freund of the Harvard Law School in his article, "Civil Rights and the Limits of Law," 14 *Buffalo L. Rev.* 199 (1964). Professor Freund made reference to the rejection of efforts to push the Fourteenth Amendment further in the involvement in public accommodations, and wrote in part:

> "Those who argue that the Fourteenth Amendment, in and of itself, applies or should apply to the places of public accommodation do so partly because they see in the Fourteenth Amendment the most appropriate source of moral strength. But I believe they overlook some institutional considerations of importance. If we were to use the Fourteenth Amendment directly without the intervention of an act of Congress, as some members of the Court wished to do last June, there would have been all kinds of unresolved questions of the range of application of the Fourteenth Amendment; not merely in racial discrimination, for the Fourteenth Amendment is far broader than that, but in other forms of equal protection, nepotism in business, for example, in the concept of due process of law applied, for instance, to the conduct of stockholder meetings, or labor union meetings. All of these would potentially be Federal Constitutional questions to be resolved by authoritative decisions overrulable by constitutional amendment, but surely lacking in that sense of tentativeness, of experimentation, of progressivism, of flexibility, that are the hallmarks of statutory or common law development as distinguished from constitutional adjudication. And so I for one welcome the fact that the Court did not see fit last June to decide the cases on sit-ins in places of public accommodation on grounds of the Fourteenth Amendment per se. The choice of institutional means pointed in the direction of the

more flexible and ad hoc approach. 14 *Buffalo L. Rev.*, 203-204."

He extended this analiysis to the problem of so-called "de facto" segregation and urged the courts not to get involved in the creation of affirmative programs to balance races through constitutional law:

> "Still a legislature or a school board ought to be able to take account of the facts of segregation in the interest of promoting long-run de facto desegregation, which is surely a legitimate aim. This is the position taken by both the New York Court of Appeals and the New Jersey Supreme Court, there being no issue in the case of requiring integration constitutionally but only of *permitting the race factor to be taken into account by a school board disposed to do so,* without violating the abstract principle of color-blindness. This is a question of *educational and social policy, a choice of means to a legitimate end,* the encouragement of desegregation, as segregation itself would be an illegitimate end. There the matter rests, and in my judgment, is likely to rest so far as constitutional law is concerned. 14 *Buffalo L. Rev.* 199, 205" (Emphasis added)

CONCLUSION

In conclusion, it appears that the petition is premature in that the record reflects nothing of the application, or effect of such application, of the District Court order. Further, the matter is still pending in the District Court.

Furthermore, this petition presents no new question not already presented to the Court, in at least one other case, *Deal* v. *Cincinnati Board of Education*, and the petition was denied.

For these reasons it is respectfully submitted the petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply brief has been mailed by regular United States Mail, postage prepaid, to adversary counsel of record.
This 9th day of November, 1967.

RUSSELL RICE, SR.
Attorney for Respondents

APPENDIX

Tina Deal, etc., et al., vs. Cincinnati Board of Education.

369 F(2)55

Opinion of the United States Court of Appeals for the Sixth Circuit, December 6, 1966

Before WEICK, Chief Judge, O'SULLIVAN and PHILLIPS, Circuit Judges.

WEICK, Chief Judge. The suit in the District Court was a class action against the Board of Education of the City of Cincinnati, brought by the parents and next friends of Negro pupils enrolled in the public schools of the city, to enjoin the operation of allegedly racially segregated public schools, to enjoin the construction of new schools on sites which would increase and harden alleged existing patterns of racial segregation, and for declaratory and other relief.

The Board denied that it created, operated or maintained racially segregated schools, and alleged that the only genuine issue in the case was whether it violated the constitutional rights of the plaintiffs by refusing to adopt and enforce an affirmative policy of balancing the races in the Cincinnati Public School System.[1]

[1] On March 9, 1964, after the commencement of the present action, the Board of Education adopted the following policy statement to guide its officers and employees:

"(1) As a matter of policy, the Board would like to avoid predominantly Negro schools to the extent that the Board has any control over the causes which create such predominance. But in exercising any control in this area the Board will not deviate from the long established neighborhood school plan or the requirement of Section 3313.48 R.C. that schools be located where they will be most convenient for the largest number of students.

"The Board is willing to make race of students one of the elements to be considered in the establishment of school attendance zone lines so long as this can be done consistently with the neighborhood school policy, the requirements of Section 3313.48, and the numerous factors which have always been considered in establishing such zone lines as—safety of children, travel distance and capacity of school.

"(2) The Board does not accept the concept of de facto segregation and will not agree to any proposal to bus students, to transfer classes or any other program to attempt to balance races as such."

The evidence in the case consisted of a number of lengthy stipulations, exhibits, and oral testimony. At the close of plaintiffs' evidence defendants moved for judgment, which motion was taken under advisement by the Court. Defendants presented their entire case except for expert testimony. The Court then granted defendant's motion for judgment without considering the evidence offered by the defendants. He handed down an opinion which he adopted as findings of fact and conclusions of law under Rules 41(b) and 52(a), Fed.R.Civ.Proc.[2] In essence, the Court held that there was no constitutional duty incumbent upon the Board to balance the races in the public school system, and that there was a failure of proof on the part of the plaintiffs to establish a policy of segregation or gerrymandering on the part of the Board.

WAS THERE A CONSTITUTIONAL DUTY ON THE PART OF THE BOARD TO BALANCE THE RACES IN THE CINCINNATI PUBLIC SCHOOLS WHERE THE IMBALANCE WAS NOT CAUSED BY ANY ACT OF DISCRIMINATION ON ITS PART?.

At the outset it should be pointed out that the State of Ohio abolished segregation in the public schools on February 22, 1887, which was more than 67 years before the United States Supreme Court barred it on constitutional grounds in the momentous decision of *Brown* v. *Board of Education*, 347 U.S. 483 (1954).[3]

The so-called neighborhood plan for the location of public schools is authorized by statute under which Ohio School Boards are required to—

> ". . . provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be convenient for

[2] *Deal* v. *Cincinnati Board of Education*, 244 F.Supp. 572 (S.D. Ohio 1965).

[3] 84 Ohio Laws 34, enacted Feb. 22, 1887. The Supreme Court of Ohio upheld and enforced the law in the following year, *Board of Education* v. *State*, 45 Ohio St. 555, 16 N.E. 373 (1888).

The Cincinnati school system discontinued compulsory segregation promptly after the enactment of this Ohio Statute in 1887. Since that time Negro students have had the opportunity to attend the neighborhood schools in Cincinnati on the same basis as white students living in the same localities.

the attendance of the largest number thereof." Ohio Rev. Code §3313.48.

We think the legislature had the power to enact this statute. The Cincinnati Board of Education has complied with it.

Appellants contend that the maintenance of a public school system in which racial imbalance exists is a violation of their constitutional right to the equal protection of the law. They assert that because the Negro student population is not spread uniformly throughout the Cincinnati school system, without a showing of deliberate discrimination or even racial classification, there is a duty of constitutional dimensions imposed on the school officials to eliminate the imbalance. Appellants claim that it is harmful to Negro children to attend a racially imbalanced school and this fact alone deprives them of equal educational opportunity.

The essence of the *Brown* decision was that the Fourteenth Amendment does not allow the state to classify its citizens differently solely because of their race. While the detrimental impact of compulsory segregation on the children of the minority race was referred to by the Court, it was not indispensable to the decision. Rather, the Court held that segregation of the races was an arbitrary exercise of governmental power inconsistent with the requirements of the Constitution.

A finding of educational or other harm is not essential to strike down enforced segregation. This is shown by many subsequent cases nullifying separate facilities of all kinds with no evidence of harm.

In summarizing this principle, the Court said that classifications based on race violate the Fourteenth Amendment because they are obviously invidious and irrelevant. *Goss* v. *Board of Education*, 363 U.S. 683, 687 (1963).

Thus it is not necessary that a victim of racial discrimination prove that he was harmed in any specific material sense in order to invalidate state-imposed racial distinctions. See *Johnson* v. *Virginia*, 373 U.S. 61 (1963) (seating in courtrooms); *Watson* v. *Memphis*, 373 U.S. 526 (1963) (municipal parks); *Burton*

v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) (restaurants in public buildings); *Dawson* v. *Mayor and City Council of Baltimore*, 220 F.2d 386 (4th Cir. 1955) aff'd 350 U.S. 877 (1955) (public beaches and bathhouses).

In *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), which is a companion case to *Brown*, and which involved the validity of school segregation in the District of Columbia, the Court held that the Fifth Amendment was violated. The Court emphasized that it was the fact of discriminatory classification by the government that violated the Constitution, and looked no further for evidence of educational or psychological injury, saying—

> "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Bolling* v. *Sharpe*, *supra*, at 499.

The principle thus established in our law is that the state may not erect irrelevant barriers to restrict the full play of individual choice in any sector of society. Since it is freedom of choice that is to be protected, it is not necessary that any particular harm be established if it is shown that the range of individual options has been constricted without the high degree of justification which the Constitution requires. It is harm enough that a citizen is arbitrarily denied choices open to his fellows.

Conversely, a showing of harm alone is not enough to invoke the remedial powers of the law. If the state or any of its agencies has not adopted impermissible racial criteria in its treatment of individuals, then there is no violation of the Constitution. If factors outside the schools operate to deprive some children of some of the existing choices, the school board is certainly not responsible therefor.

Appellants, however, argue that the state must take affirmative steps to balance the schools to counteract the variety of private pressures that now operate to restrict the range of choices presented to each school

child. Such a theory of constitutional duty would destroy the well-settled principle that the Fourteenth Amendment governs only state action. Under such a theory, all action would be state action, either because the state itself had moved directly, or because some private person had acted and thereby created the supposed duty of the state to counteract any consequences.

The standard to be applied is "equal educational opportunity." The Court in *Brown* cast its decision thus because it recognized that it was both unnecessary and impossible to require that each child come through the complex process of modern education with the same end result. This approach grants due respect for the unavoidable consequences of variations in individual ability, home environment, economic circumstances, and occupational aspirations. Equal opportunity requires that each child start the race without arbitrary official handicaps; it does not require that each shall finish in the same time.

Appellants, however, pose the question of whether the neighborhood system of pupil placement, fairly administered without racial bias, comports with the requirements of equal opportunity if it nevertheless results in the creation of schools with predominantly or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral easily determined standards, and better home-school communication. The Supreme Court in *Brown* recognized geographic districting as the normal method of pupil placement and did not foresee changing it as the result of relief to be granted in that case. *Brown* v. *Board of Education*, 347 U.S. 483, 495 note 13, question 4(a); *Brown* v. *Board of Education*, 349 U.S. 294, 300-01 (1955). But

see *Blocker* v. *Board of Education of Manhasset*, 226 F.Supp. 208, 221-222 (E.D.N.Y. 1964).

Because of factors in the private housing market, disparities in job opportunities, and other outside influences, (as well as positive free choice by some Negroes), the imposition of the neighborhood concept on existing residential patterns in Cincinnati creates some schools which are predominantly or wholly of one race or another. Appellants insist that this situation, which they concede is not the case in every school in Cincinnati, presents the same separation and hence the same constitutional violation condemned in *Brown*. We do not accept this contention. The element of inequality in *Brown* was the unnecessary restriction on freedom of choice for the individual, based on the fortuitous, uncontrollable, arbitrary factor of his race. The evil inherent in such a classification is that it fails to recognize the high value which our society places on individual worth and personal achievement. Instead, a racial characterization treats men in the mass and is unrelated to legitimate governmental considerations. It fails to recognize each man as a unique member of society.

In the present case, the only limit on individual choice in education imposed by state action is the use of the neighborhood school plan. Can it be said that this limitation shares the arbitrary, invidious characteristics of a racially restrictive system? We think not. In this situation, while a particular child may be attending a school composed exclusively of Negro pupils, he and his parents know that he has the choice of attending a mixed school if they so desire, and they can move into the neighborhood district of such a school. This situation is far removed from *Brown*, where the Negro was condemned to separation, no matter what he as an individual might be or do. Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school, preju-

dice.[4] We read *Brown* as prohibiting only enforced segregation.

The School Board, in the operation of the public schools, acts in much the same manner as an administrative agency exercising its accumulated technical expertise in formulating policy after balancing all legitimate conflicting interests. If that policy is one conceived without bias and administered uniformly to all who fall within its jurisdiction, the courts should be extremely wary of imposing their own judgment on those who have the technical knowledge and operating responsibility for the educational system. Thus, whereas such a geographical principle might be totally unacceptable in the administration of facilities such as beaches, parks, restaurants, or golf courses (see desegregation cases cited above), the school system presents problems of an altogether different nature and the fair minded judgment of the school officials is entitled to full consideration in determining whether freedom of choice has been preserved for the children within the limits necessary for effective educational practice. See *Watson* v. *Memphis*, *supra*, at 531-532.

We hold that there is no constitutional duty on the part of the Board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance that it did not cause, nor is there a like duty to select new school sites solely in furtherance of such a purpose.

The bussing of pupils away from the neighborhoods of their residences may create many special problems for boards of education. These include the providing of

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[4] The District Court correctly excluded evidence of alleged discrimination in the public and private housing markets. Such discrimination is caused, if in fact it does exist, by persons who are not parties to this case and the Board has no power to rectify that situation. If appellants have any valid claim for infringement of their rights by public housing or urban renewal officials, they may obtain appropriate relief against them under the Fourteenth Amendment. With respect to private actions amounting to discriminatory practice, while there is no federal constitutional right available to appellants, they may seek relief from the state Civil Rights Commission or in the state courts, if relief is denied, under the provisions of the Ohio Fair Housing Law. Ohio Rev. Code §4112.01-07.

adequate transportation and proper facilities and personnel for the supervision, education and well being of *all* pupils. All of this must be accomplished within the Board's budget.

Although boards of education have no constitutional obligation to relieve against racial imbalance which they did not cause or create, it has been held that it is not unconstitutional for them to consider racial factors and take steps to relieve racial imbalance if in their sound judgment such action is the best method of avoiding educational harm. *Balaban* v. *Rubin*, 14 N.Y.2d 193, 199 N.E.2d 375 (1964), *cert. denied* 379 U.S. 881 (1964); *Morean* v. *Board of Education of Montclair*, 42 N.J. 237, 200 A.2d 97 (1964).

> "The tenor of these and related decisions . . . clearly indicates that the Fourteenth Amendment, while prohibiting any form of invidious discrimination, does not bar cognizance of race in a proper effort to eliminate racial imbalance in a school system." *Offerman* v. *Nitkowski*, 248 F.Supp. 129, 131 (W.D.N.Y. 1965)

In dealing with the multitude of local situations that must be considered and the even greater number of individual students involved, we believe it is the wiser course to allow for the flexibility, imagination and creativity of local school boards in providing for equal opportunity in education for all students. It would be a mistake for the courts to read *Brown* in such a way as to impose one particular concept of educational administration as the only permissible method of insuring equality consistent with sound educational practice. We are of the view that there may be a variety of permissible means to the goal of equal opportunity, and that room for reasonable men of good will to solve these complex community problems must be preserved. See Freund, *Civil Rights and the Limits of the Law*, 14 Buffalo L.Rev. 199, 205 (1964).

Moreover, our refusal to restrict the school board with a mathematically certain formula for the vindication of individual constitutional rights is not an innovation. The right to a trial by an impartial, fairly

selected jury, is well established in our law and it has been protected against the same sort of disguised racial discrimination that has been attempted in the school desegregation cases. *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958); *Smith* v. *Texas*, 311 U.S. 128 (1940); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Ex parte Virginia*, 100 U.S. 339 (1879); *Strauder* v. *West Virginia*, 100 U.S. 303 (1879).

However, it is equally clear that a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which is to try him nor on the venire or jury roll from which petit jurors are to be chosen. *Swain* v. *Alabama*, 380 U.S. 202, 208 (1965); *Akins* v. *Texas*, 325 U.S. 398, 403 (1945). While the two situations may not be completely analogous, the potential dangers to a criminal defendant forced to face a racially imbalanced jury, are at least as great as the intangible, often speculative injuries threatening a student in a racially imbalanced school. The cases recognize that the calculus of equality is not limited to the single factor of "balanced schools"; rather, freedom of choice under the Fourteenth Amendment is a function of many variables which may be manipulated differently to achieve the same result in different contexts.

If the separation in imbalanced schools is the result of racial discrimination, the officials must take steps to remedy the situation. However, the Constitution does not prescribe any single particular cure, and the mere fact of imbalance alone is not a deprivation of equality in the absence of discrimination.

Two other Circuits have considered this question and have come to the same conclusion. *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988 (10th Cir., 1964), *cert. denied* 380 U.S. 914 (1965); *Bell* v. *School, City of Gary*, 324 F.2d 209 (7th Cir. 1963), *cert. denied* 377 U.S. 924 (1964). See also *Springfield School Comm.* v. *Barksdale*, 348 F.2d 261, 264 (1st Cir. 1965).

Appellants rely on several decisions which they contend establish the constitutional invalidity of imbalanced schools. However, it would seem that these cases

do not go that far. In each of them there was an added element which transmuted mere separation into segregation, difference into discrimination. This is in accord with our holding that bare statistical imbalance alone is not forbidden. There must also be present a quantum of official discrimination in order to invoke the protection of the Fourteenth Amendment.

In *Taylor* v. *Board of Education of City School Dist. of New Rochelle*, 294 F.2d 36 (2nd Cir. 1961), *cert. denied* 368 U.S. 940 (1961), the Court of Appeals characterized as "crucial" the District Court's finding that the defendant School Board has deliberately created and maintained a segregated school, saying at page 39:

> "In short, race was made the basis for school districting, with the purpose and effect of producing a substantially segregated school."

This situation, where affirmative gerrymandering of school districts had been accomplished and maintained with the motive of separating the races, was found to go "beyond *mere* imbalance" (emphasis added). This latter language clearly indicates that the Court's theory was one of "imbalance plus." See also Kaplan, *Segregation, Litigation and the Schools: The New Rochelle Experience*, 58 Nw. U.L. Rev. 1 (1963).

Appellants place much emphasis on *Dowell* v. *School Board of Oklahoma City Public Schools*, 244 F. Supp. 971 (W.D. Okla. 1965), but we are unable to adapt that case to the problem of racial imbalance. Despite appellants' assertion that the District Court in *Dowell* dealt with facts similar to those in the case before us, it is clear that it did not. In that case the problem was one of initial desegregation of a school system which had previously been organized along the dual racial lines condemned by *Brown*. The Court was explicit in this respect:

> "This case does not raise issues regarding a school board's constitutional duty to correct racial imbalance in localities where there is no prior history of segregation, or where prior racial policies are deemed corrected." (pp. 980-981)

Further, it is clear that the duty of a school board in first imposing a neighborhood districting system where none was used before, is different from that where the system has been used for many years and the imbalance in the schools is the result of population mobility among the various neighborhoods. In *Dowell*, the Court noted that the relative immobility of the Negro residents was used by the school board in separating them through the neighborhood policy, while in Cincinnati one of the primary causes of imbalance has been the rapid movement of the Negro population into different areas of the city. Thus, the problem in *Dowell* was far closer to the gerrymandering in *Taylor* than to anything in the classic statistical imbalance cases in northern cities.

Finally, in the one case in which a district Court apparently accepted the appellant's theory of racial imbalance, *Barksdale* v. *Springfield School Comm.*, 237 F.Supp. 543 (D. Mass. 1965), the First Circuit, in vacating the decision and dismissing the complaint without prejudice specifically rejected any such asserted constitutional right. *Springfield School Comm.* v. *Barksdale*, 348 F.2d 261, 264 (1st Cir. 1965).

Appellants' right to relief depends on a showing of more than mere statistical imbalance in the Cincinnati schools. They must also expose that added quantum of discriminatory state action which deprives them of their constitutional right to freedom of choice. If the school officials, through overt practice or by subterfuge, have treated students differently solely because of race, then they not only must cease doing so, but also must take affirmative action to remedy the condition which they have caused. Thus, even if the Negro students were distributed uniformly in the schools, if other forms of discrimination were used against them they would still be entitled to the aid of the law. When no discrimination is shown, racial imbalance alone is no warrant for relief.

Did The Board Of Education Intentionally Cause Racial Imbalance In The Cincinnati Public Schools, Deprive Negro Children Of Equal Educational Opportunities, And Discriminate Against Negroes In The Hiring And Assignment Of Teachers?

In their "Statement of Questions Involved" appellants assert that they have sufficiently shown that the Board of Education has *intentionally* caused, and then failed to eliminate, serious racial imbalance in the Cincinnati public schools, has afforded Negro children who are confined to segregated schools, inferior educational programs and facilities, and has provided school faculties and personnel which reflect the racial patterns of students. They state that children who attend racially imbalanced schools suffer injury constituting a denial of equal educational opportunity.

The findings of fact of the District Court assume significance in our review of this phase of the case. Under Rule 52(a) the court was required to find the facts specially. The findings should be both "comprehensive and pertinent to the issues to provide a basis for decision." *Schilling* v. *Schwitzer-Cummins Co.*, 142 F.2d 82, 84 (D.C. Cir. 1944); *Shapiro* v. *Rubens*, 166 F.2d 659 (7th Cir. 1948). In meeting this standard, the District Courts are not required to prepare elaborate findings on every possible issue or contention raised at trial. However, there must be subsidiary findings to support the ultimate conclusions of the court. *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 420 (1943); *Dearborn Nat'l Cas. Co.* v. *Consumers Petroleum Co.*, 164 F.2d 332, 333 (7th Cir. 1947). See also *Townsend* v. *Benamente*, 339 F.2d 421 (9th Cir. 1964). But see *Gay Games, Inc.* v. *Smith*, 132 F.2d 930, 931 (7th Cir. 1943).

At the trial level this case confronted the District Court with an enormous amount of evidence in the form of detailed maps, charts, statistical tables, sociological studies, and historical accounts, in addition to a substantial amount of oral testimony, expert and otherwise. To his credit, the District Judge succeeded

to a great degree in expediting the trial through the extensive use of many stipulations and effective pretrial procedures, which sharpened the issues. However, in his opinion he adopted as fair the following statement taken verbatim from the School Board's brief:

> "The Cincinnati Public School System includes a number of schools which are attended almost entirely by Negro pupils, a number of schools attended entirely by white pupils, and a number of schools attended by both Negro and white pupils in various percentages of each of the races; the racial composition of each school is simply a result of the racial composition of the neighborhoods which they serve."

Then, after discussing the issue of imbalance, he stated:

> "Their [appellants'] failure to produce evidence to establish a policy of segregation or gerrymandering on the part of defendants strongly suggests that such practices have not been engaged in. It is here found that plaintiffs have failed to establish a deprivation of rights under the law or under the Constitution of the United States by the requisite degree of proof . . ."

In dealing with the issue of discrimination in the context of a great metropolitan educational complex, these general findings do not present an adequate basis for review by this Court.

The District Court's finding on the racial composition of the schools in Cincinnati reveals that the schools are indeed racially imbalanced. In other words, the Negro student population is not spread uniformly among the individual schools, mainly because of the operation of the neighborhood school policy in conjunction with the residential concentration of Negroes in some areas. As the District Court held, and we affirmed above, this fact by itself gives rise to no relief. However, the crucial fact to be found is whether the racial imbalance was intentionally caused by gerrymandering or by other alleged discriminatory prac-

tices on the part of the Board. On that point the District Judge said only that appellants had failed to produce evidence to establish gerrymandering or other discriminatory practice and that this failure strongly suggested that such practices did not exist. Such a general finding must be supported by subsidiary findings of fact. *Kelley* v. *Everglades Drainage District, supra.*

Appellants, through extensive use of discovery techniques, adduced vast quantities of information concerning matters such as alleged discrimination in school attendance zoning, transportation policies, teacher selection and assignment, comparative test results, and policies on transfers and overcrowding of students. Some of their contentions with respect thereto are answered by appellees on appeal here, but some are not. This is due partly to the truncated status of the case at the time of the District Court's decision on the motion to dismiss, and partly because the Court considered only appellants', and not the school Board's, evidence in ruling on the motion.

An example of such unanswered and unaccounted for situations is the districting of the Sawyer Junior High School where the enrollment is mostly Negro. The fact is that its boundaries exclude children who live across the street from it in a largely white neighborhood. The School Board in its brief offered no explanation for this situation or for the selection of the Sawyer site so close to the existing Withrow Junior High School.

We have stated above that a showing of impairment of a Negro student's capacity to learn, arising from his school's racial imbalance, does not, standing alone, make out a case of constitutional deprivation. Evidence of such harm, however, may indeed be relevant to the issues of the case before us. Appellants offered expert evidence on this subject. The School Board offered no opposing expert testimony, no doubt because the Court granted the Board's motion to dismiss, made at the close of plaintiffs' proofs. Our review would be helped by a finding as to whether the District Judge considered plaintiffs' expert testimony of such relevance, weight or probative value as to make an issue calling for rebuttal proof by defendant.

No findings were made on these disputed issues. Without findings we are unable to determine whether discrimination existed with respect to specific schools and programs.

Other errors have been asserted which, in the light of our other holdings, we deem insubstantial.

The judgment of the District Court is affirmed on the issue of racial imbalance not intentionally caused by the Board, and the case is remanded for further findings on the issues of claimed discrimination in specific schools and programs and claimed harm to Negro students, allegedly caused by racially imbalanced schools, and for the taking of such additional relevant evidence as either party may offer. *Northcross v. Board of Education of Memphis*, 333 F.2d 661, 663-664 (6th Cir. 1964).